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REMEMBERING OTTO KAUS

*Stanley Mosk**

It was a little over a decade ago that Otto Kaus wrote a flattering article about me for a law review. In it he suggested that my activities, on and off the bench, were so numerous and varied that "there are at least three of him."¹ This was long before the developments in cloning.

I am reluctant to quarrel with any conclusion of Otto Kaus. Thus if there are really three-of-me, then all three of us have been staunch admirers of Otto—the lawyer, judge, writer, husband, father, and warm human being. I had long anticipated having an opportunity to pen a laudatory piece about him, not merely as literary reciprocation, but to let him know of my heartfelt respect and admiration. Unfortunately the grim reaper beat me to it.

Otto Kaus was not a one-dimensional man. His interests were varied. He was a truly cultured person who knew and enjoyed music, the opera, symphonies, art, and literature. And he respected others who had similar interests. He was also a competitive tennis player.

In the area of the law I would rate Otto Kaus as one of the finest California legal minds produced in modern times. He was a fine lawyer, a splendid court of appeal justice, and a most distinguished member of the California Supreme Court for much too short a time.

I glanced over a number of his numerous opinions for the court of appeal and the supreme court. His warmth, his human outlook, yes and his gentle humor, all stand out. I offer a few, a very few, examples.

Otto Kaus achieved a certain immortality with his often quoted remark about the crocodile in the bathtub.² But that, as

* Stanley Mosk has been a Justice of the California Supreme Court since 1964, the second longest period in the state's history. In those 33 years he has written many of the court's important opinions.

1. Otto M. Kaus, *The Three Faces of Stanley Mosk*, 12 HASTINGS CONST. L.Q. 367, 367 (1984-1985).

2. Otto Kaus repeatedly stated that "ignoring the political consequences of visible decisions is 'like ignoring a crocodile in your bathtub.'" Julian N. Eule,

they say, was only the tip of the iceberg. He frequently expressed his views with a dramatic flair, one that could easily be understood not only by the bench and bar but even by any lay person who might stumble over a law book.

For example, in *Kisbey v. California*³ he felt he had to rule for municipal immunity in a suit by one who claimed injury by a police officer. Oliver Wendell Holmes wrote in *The Common Law*⁴ that the "life of the law has not been logic: it has been experience."⁵ Showing distaste for the result Otto felt impelled to reach in this case, he declared "that the life of the law is not logic, but expedience."⁶

In another public officer immunity case he explained the result simply: "[T]he immunity cart has been placed before the duty horse."⁷

Otto obviously liked Shakespeare and quoted him as an authority a number of times. For example in *Mardikian v. Commission on Judicial Performance*⁸ he defended the accused judge in this manner: "Petitioner is being made the scapegoat for the twin plagues of judicial overload and backlog—evils that were apparently well entrenched when Shakespeare had Hamlet deplore 'the law's delay.'"⁹

Shakespeare was again called upon in a paternity suit.¹⁰ To advance the presumption of a child's legitimacy, Kaus noted

"that Shakespeare was familiar with the rule, for he made reference to it in King John, act I, scene 1: '*King John*.—Sirrah, your brother is legitimate; Your father's wife did after wedlock bear him; And, if she did play false, the fault was hers; Which fault lies on the hazards of all husbands That marry wives.'"¹¹

Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. COLO. L. REV. 733, 739 (1994).

3. 36 Cal. 3d 415, 682 P.2d 1093, 204 Cal. Rptr. 428 (1984).

4. OLIVER WENDELL HOLMES, *THE COMMON LAW* (Mark DeWolfe Howe ed., Little, Brown and Company 1963).

5. *Id.* at 5.

6. *Kisbey*, 36 Cal. 3d at 418, 682 P.2d at 1095, 204 Cal. Rptr. at 430.

7. *Williams v. California*, 34 Cal. 3d 18, 22, 664 P.2d 137, 139, 192 Cal. Rptr. 233, 235 (1983).

8. 40 Cal. 3d 473, 709 P.2d 852, 220 Cal. Rptr. 833 (1985).

9. *Id.* at 485, 709 P.2d at 860, 220 Cal. Rptr. at 841 (Kaus, J., dissenting).

10. *See Estate of Cornelious v. Taylor*, 35 Cal. 3d 461, 674 P.2d 245, 198 Cal. Rptr. 543 (1984).

11. *Id.* at 464, 674 P.2d at 247, 198 Cal. Rptr. at 545 (quoting *S.D.W. v. Holden*, 275 Cal. App. 2d 313, 316, 80 Cal. Rptr. 269, 271 (1969)).

In *People v. Superior Court (Cope)*¹² Justice Kaus dealt with police arresting a man in his home, thus leaving wholly unattended his huge St. Bernard dog. The officers, wrote Otto, "did not plan to take the dog into custody."¹³ He then enumerated all the firearms, kerosene, and other inflammatory chemicals lying around the house and mused that

[i]t does not require the ingenuity of a Rube Goldberg to imagine the unattended dog knocking over a can of volatile liquid or knocking over and discharging the shotgun, or both, and causing either a fire or an explosion. . . .

. . . The prospect of a St. Bernard left to his own devices in this environment, in the dark, is enough to send shudders through any reasonable man.¹⁴

Though it was later reversed by the supreme court, when the court of appeal upheld the city of Los Angeles's right to display a cross in the windows of City Hall,¹⁵ Otto Kaus wryly commented in public that the court of appeal produced the finest opinion he had ever read that said a religious symbol had nothing to do with religion.

*Turpin v. Sortini*¹⁶ was a sad case in which Justice Kaus and I did not see eye to eye. A child, born with a serious defect, sued the medical doctors for not preventing her birth. Her basic contention was that she would be better off not born, rather than to suffer a lifetime of disability. Kaus could find no authority for that cause of action—and I must admit, I did sympathize with his efforts—but he did show compassion by allowing damages for future costs of the extraordinary efforts to treat the hereditary ailment.¹⁷

On the other hand, I dissented, agreeing with a recent court of appeal opinion that found there could be an action for wrongful life as well as for wrongful death.¹⁸ This was a somewhat esoteric concept but conceivably (no pun intended) it can exist under unusual circumstances.

12. 103 Cal. App. 3d 186, 162 Cal. Rptr. 667 (1980).

13. *Id.* at 189, 162 Cal. Rptr. at 668.

14. *Id.* at 190, 162 Cal. Rptr. at 669.

15. See *Fox v. Los Angeles*, 70 Cal. App. 3d 885, 139 Cal. Rptr. 180 (1977), *rev'd*, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).

16. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

17. See *id.* at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.

18. See *Curlender v. Bioscience Lab.*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

In *People v. Superior Court (Engert)*¹⁹ Justice Kaus tried to analyze under the provisions of a statute what constitutes conduct "unnecessarily torturous to the victim" and found it difficult, if not impossible, to suggest the obverse: what would be "necessary torture."²⁰ I am reminded of the fictional Horace Rumpole of Old Bailey: someone spoke of an unsavory scandal; he wondered what a savory scandal would be like.²¹

In *People v. Bledsoe*²² Kaus discussed at some length the so-called rape trauma syndrome. While it may be admissible under some circumstances, he held the testimony of an expert on that subject cannot substitute for proof that a rape in fact occurred.²³

Otto liked not only rationality but consistency in the law. In *Delta Farms Reclamation District v. Superior Court*²⁴ he held a public agency liable regardless of the nature of the person injured. As he said,

an improved but dangerously rutted street would expose a city to liability to a bicyclist who commutes to work, even though it was under "no duty" to keep the same street safe for the recreational rider right behind him. We doubt that there is a single city attorney in this state who would submit such an absurdity to a court of law.²⁵

He had little patience with obvious evasions of the law. In *Shuey v. Superior Court*²⁶ police officers invaded a home to make an arrest without a warrant. There was an emergency, they contended. Wrote Otto: "The emergency was strictly of the 'do-it-yourself' variety."²⁷

Otto had great respect for the legal profession. But he also maintained lawyers had professional responsibilities that could not be disregarded or evaded. He often contended that inexcusable neglect should never be condoned by courts lest the courts unwittingly become instruments undermining the orderly process of the law. In *Carroll v. Abbott Laboratories, Inc.*²⁸ he cautioned that any

19. 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).

20. *Id.* at 802-03, 647 P.2d at 78, 183 Cal. Rptr. at 802.

21. Horace Rumpole is the mythical barrister immortalized in the works of John Mortimer. See generally JOHN MORTIMER, *THE FIRST RUMPOLE OMNIBUS* (1983).

22. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

23. See *id.* at 252, 681 P.2d at 301-02, 203 Cal. Rptr. at 460.

24. 33 Cal. 3d 699, 660 P.2d 1168, 190 Cal. Rptr. 494 (1983).

25. *Id.* at 707, 660 P.2d at 1173, 190 Cal. Rptr. at 499 (footnote omitted).

26. 30 Cal. App. 3d 535, 106 Cal. Rptr. 452 (1973).

27. *Id.* at 541, 106 Cal. Rptr. at 455.

28. 32 Cal. 3d 892, 654 P.2d 775, 187 Cal. Rptr. 592 (1982).

exception "should be narrowly applied, lest negligent attorneys find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to rise to ever greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship."²⁹

Often in capital cases a majority of the supreme court will rely on "harmless error" to excuse, or overlook, errors committed during the course of the trial. Not Otto Kaus. In *People v. Ramos*³⁰ he exhibited the courage to write the opinion reversing a death penalty conviction because of trial errors.

In citing opinions he wrote I certainly do not mean to be flip-pant or to suggest that on occasion humor replaced rationality in Otto Kaus opinions. Not so.

I merely intend to emphasize that Otto Kaus was not only a brilliant legal scholar but that he had the ability to see issues and write about them in a human manner.

I miss Otto Kaus. My colleagues on the bench miss Otto Kaus. More significantly, society and the law miss Otto Kaus.

29. *Id.* at 900, 654 P.2d at 779, 187 Cal. Rptr. at 596.

30. 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984).

